Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the Act;	)	RM-11293
Amendment of the Commission's Rules and	)	RM-11303
Policies Governing Pole Attachments	)	

COMMENTS OF KNOLOGY, INC.

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Knology, Inc. ("Knology") hereby submits its comments in response to the Federal Communications Commission's ("FCC's" or "Commission's") Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The importance of the Commission's pole attachment rules and policies is often underestimated. They are sometimes viewed as having merely a tangential impact on the greater policy goals of the Commission. It would be mistaken, though, to consign federal pole attachment rules and policies to a "back porch" status. These rules and policies directly affect the operations of facilities-based providers of broadband and other communications services. Consequently, the Commission's actions in this proceeding will influence the ability to deliver broadband services to consumers in urban, suburban, and rural areas; and they will affect the prices that residential and business consumers will pay for their telephone, cable and broadband services. Properly crafted, the

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1 *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments,* WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) ("*Notice*" or "NPRM").

Commission's rules and policies arising from this proceeding will stimulate greater competition in broadband, cable, and telephone services and will increase the willingness of companies to enter new markets.

Knology commends the Commission's inquiry into both rate and non-rate elements of pole attachment policies. As described more fully below, Knology believes that a uniform pole attachment rate for all broadband providers is consistent with the Commission's effort to maintain regulations affecting broadband services that are technologically neutral.[2] Establishing that uniform rate using the formula derived from Section 224(d)(1)[3] (the "cable formula") would satisfy constitutional requirements of compensating pole owners, avoid unnecessary increases in pole attachment costs for broadband providers, and would simplify the process of assessing pole attachment fees.

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2 *See, e.g., Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 2 (2007); *see also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 6 (2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 1 (2005); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶ 2 (2006).

3 47 U.S.C. § 224(d)(1).

The Commission also should adopt rules to reduce disagreements over non-rate pole attachment issues. For example, the Commission can reduce the number of pole attachment complaints and encourage private mediation by allowing refunds for amounts paid by an attacher to a utility before a pole attachment complaint is filed and by continuing to permit utilities and attachers to dispute the reasonableness of the terms and conditions of pole attachment agreements without temporal limitation. The Commission also should establish rules to limit the amounts charged by utilities for pole audits and to clarify the mechanism by which those charges are assessed. It should also prevent such practices as retroactive imposition of new pole attachment policies, assessment of excessive unauthorized attachment fees, and interest charges that exceed the rate set for the relevant period by the Internal Revenue Service ("IRS") for individual underpayments pursuant to Section 6621 of the Internal Revenue Code.[4] The Commission should take a more active role in regulating the make-ready practices of utilities, including the costs and the speed of completing make-ready requests. Finally, the Commission should establish an enforceable mechanism to provide an effective disincentive to the unreasonable utility practice of instituting or forcing excessive and frivolous litigation.

II. THE FCC SHOULD ADOPT A UNIFORM BROADBAND POLE ATTACHMENT RATE

Knology supports the general principle that a company's success in the marketplace should be premised on the quality and price of its service offerings. Companies should not be compelled to alter business plans or switch technologies solely to avoid disadvantages that would result inadvertently from the operation of federal

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[4] 26 U.S.C. § 6621.

communications policies. The Commission's current pole attachment rate formulae distort the marketplace for broadband services in ways that offer no corresponding increase in social welfare.

The current federal dual-rate regime imposes a substantially higher pole attachment rate on companies that offer traditional telecommunications services in addition to cable and broadband services. In those regions where Knology offers traditional telecommunications services, its pole attachment costs are 200 to 300 percent higher than in regions where it does not offer traditional telecommunications services. For example, last year in just one Florida city alone, the difference between applying the cable rate to Knology's attachments throughout the city and applying the telecommunication rate to Knology's attachments throughout the city would have exceeded $670,000 for a single year. When these figures are multiplied across the many cities and counties in which Knology has pole attachments, the total differential becomes even more substantial. The dual-rate approach creates disincentives to offering telecommunications services and rewards companies that exclude these offerings from their service packages.[5]

Moreover, if the Commission ultimately determines that Voice over Internet Protocol ("VoIP") services are information services, companies providing functionally equivalent services could face drastically different pole attachment costs: a company providing telephony using VoIP would have much lower pole attachment costs than a company providing telephony using traditional circuit-switched technology. Put simply,

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5 Knology estimates that approximately 95 percent of its pole attachments are being used or are capable of being used to offer cable modem services.

the existing disparity in pole attachment rates generates cost disparities for providers depending on the technology used to provide functionally-equivalent telephone service.

Finally, the dual-rate approach needlessly increases transaction and administration costs for utilities and attachers because it so often involves inquiries (at best) or disputes (at worst) about precisely which services are being offered over the pole attachments, and where.

Because of the problems arising from the current application of the dual-rate approach, Knology supports the tentative conclusion in the NPRM that "all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service."[6] This approach would promote the regulatory parity that the Commission has sought to achieve in the delivery of broadband services[7] and would make accurate billing an easier and less contentious process.

The Commission has the legal authority to adopt a uniform pole attachment rate for providers of stand-alone or bundled broadband services. The maintenance of a "cable pole attachment rate" and a "telecommunications pole attachment rate" is a function of federal statutory design. However, the Commission is not consigned to the unenviable task of fitting pole attachment rates for the provision of every other possible communications service into one of these two categories: the statute is silent on the appropriate method of determining pole attachment charges for providing Internet access services, whether they are bundled or offered on a stand-alone basis.[8] Accordingly, the

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6 *Notice* ¶ 36.

7 *See supra* note 2.

8 *See Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327, 335-36 (2002).

Commission has the discretion to determine the appropriate formula, if any, to use in calculating pole attachment rates in those states subject to federal pole attachment rate regulation.[9]

Knology supports the use of the cable formula for the uniform broadband pole attachment rate. The NPRM expresses concern that the rate derived from the cable formula ("cable rate") does not include an allocation of the cost of unusable space.[10] However, the constitutional sufficiency of the cable rate indicates that there is no constitutional requirement to allocate the cost of unusable space among attachers.[11] Put simply, the cable rate adequately compensates utilities for the costs of attaching. Moreover, the poles are necessary for the provision of utilities' core services and would exist whether or not broadband providers were attached to them. When determining which size of a pole to install, utilities, not attachers, determine how much unusable space there will be. Indeed, the utilities won the right in the Eleventh Circuit to deny attacher requests to replace poles in order to increase capacity.[12] It would be unsound

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9 *Id.* at 338-39.

10 *Notice* ¶ 22.

11 *See FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987); *see also Alabama Cable Telecommunications Association v. Alabama Power Company*, Order, 16 FCC Rcd 12209, ¶ 46 (2001), *aff'd sub nom. Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied* 540 U.S. 937 (2003) ("*Alabama Cable v. Alabama Power*") ("The most important aspect of *Florida Power*, for purposes of our review of the issue now before us, is the court's treatment of the remaining question, whether, under traditional Fifth Amendment analysis, the Commission's pole attachment rate formula effected a taking of property without just compensation. The Court concluded that it did not. The Court stated that it could not 'seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory.' The *Florida Power* court squarely determined that the compensation provided by applying the Commission's pole attachment formula is constitutionally sufficient.") (citations omitted).

12 *See Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002).

policy to distribute financial obligations among broadband attachers for supporting the "cost" of unusable space when broadband attachers do not contribute to these costs and lack control over them. Although allocating the costs of unusable space is a function of the statutory formula in Sections 224(e)(2) and (e)(3) (the "telecommunications formula"), the Commission should not extend this unsound policy where it does not need to be extended.

The Commission should prohibit application of the telecommunications formula to the pole attachments of any broadband providers. If for no other reason, administrative complexities counsel strongly against the use of the telecommunications formula. In spite of the Commission's implementation of presumptions for the average number of attachers, utilities and attachers often disagree on the appropriate calculation of the telecommunications rate. Utilities invariably claim that the average number of attachers is low – often to unrealistically extreme levels (*i.e.*, some claim there to be an average number of two attachers which leaves room only for the electric utility and the incumbent local exchange carrier) and make it very expensive and time-consuming to challenge their claims. The utilities have made the allocation of unusable space costs an unnecessarily complicated endeavor. The complexities would be perpetuated were the telecommunications formula to be used for calculating broadband pole attachment rates.

For similar reasons, the use of a third "broadband" formula would perpetuate needlessly inflated administration costs for utilities and attachers. Just as there have been countless and costly disagreements over whether the cable rate or the telecommunications rate should apply, the introduction of a third broadband rate would *increase* the potential for disputes about precisely which services are being offered over the pole attachments and where. By contrast, the use of the cable formula for calculating the broadband rate would avoid an increase in these disputes and would eliminate the need for other costly and time-consuming components of calculating the appropriate pole attachment rate, such as determining the average number of attachers on a pole. The cable formula, unlike a new broadband formula, also has been judicially challenged and upheld, making its use a judicially sound proposition.

III. THE COMMISSION SHOULD REDUCE ITS USE OF THE CASE-BY-CASE METHOD OF ADDRESSING POLE ATTACHMENT TERMS AND CONDITIONS.

The Commission's pole attachment complaint rules largely presume that disputes will occur over annual pole attachment rental fees. Increasingly important, though, are non-rate pole attachment issues. Non-rate issues often require a different method of resolution than rate issues, particularly because they typically are more time-sensitive. The Commission should revise its rules so that it can more effectively resolve this other, equally important set of pole attachment concerns.

A. Refunds

The Commission's rules specifically provide for refunds, but state that refunds:

> will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term or condition established by the Commission *from the date that the complaint, as acceptable, was filed,* plus interest.[13]

In limited circumstances, the Commission has awarded refunds for payments made by attachers prior to filing a complaint,[14] although these represent rare exceptions to the

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13 47 C.F.R. § 1.1410(c) (emphasis supplied).

14 *See., e.g., Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, ¶ 57 (2003) ("*Knology v. Georgia Power*"); *see also Cable Texas,*

more general rule. The general prohibition on awarding refunds of payments made prior to filing a pole attachment complaint is unsuited in the context of non-recurring costs such as make-ready, when time is of the essence for the attacher,[15] particularly because the average time between the filing of a pole attachment complaint and the release of an order is approximately two years.[16]

Typically, utilities refuse to continue make-ready work until they receive payments for unreasonable charges. An attacher in this situation is left with the option of either paying the utility for the unreasonable charges without the hope of seeing a refund, or taking the time (and incurring the expense) to prepare and file a complaint with the FCC each time an unreasonable make-ready charge is assessed. The general prohibition on pre-complaint payment refunds, therefore, has the odd effect of *encouraging* parties to file pole attachment complaints (and discouraging private negotiations) because only after a complaint is filed can an attacher make payments to a utility while disputes are negotiated with any hope of seeing payments for unreasonable charges returned. Accordingly, the Commission should delete the phrase "from the date that the complaint, as acceptable, was filed" from Section 1.1410(c) of its rules.

Inc. v. Entergy Services, Inc., Order, 14 FCC Rcd 6647, ¶ 19 (CSB 1999) ("*Cable Texas v. Entergy*").

15 The Commission acknowledged that petitions for temporary stay normally are not available to resolve disputes about make-ready practices and that, barring successful negotiations, an attacher's only option is to seek recourse at the Commission by filing a pole attachment complaint. *See Knology v. Georgia Power*, 18 FCC Rcd 24615, ¶ 56.

16 For those pole attachment complaints filed with the FCC after enactment of the Telecommunications Act of 1996, the average time between the date a complaint was filed and the date that a decision on the merits (which excludes those cases that were dismissed because they had been privately negotiated to settlement) was released is 687 days.

B. Challenging the Lawfulness of a Provision in a Pole Attachment Agreement

The NPRM asks whether the Commission should adopt contours, such as time frames, on the ability of an attacher to execute a pole attachment agreement and later file a complaint challenging the lawfulness of a provision of that agreement.[17] For reasons explained below, restraining the ability of attachers to complain of unreasonable terms and conditions in pole attachment agreements would be extremely ill-advised. The Commission should retain the current system, as approved by the Court of Appeals for the D.C. Circuit in *Southern Company Services v. FCC*.[18]

The Commission has already established that the parties to pole attachment agreements do not approach negotiations with equal bargaining positions.[19] Often, attachers must accept onerous terms and conditions before they are permitted to attach to a pole (a prerequisite to providing facilities-based service). The alternative of a provider installing its own poles is not a realistic option.[20] Therefore, it is to be expected that some pole attachment agreements will contain unreasonable terms and conditions.

Sometimes, otherwise unreasonable terms and conditions are either not enforced by the utility or the circumstances that would trigger their application do not arise.

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17 *Notice* ¶ 37 n.110.

18 *See Southern Co. Services v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002).

19 *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, ¶ 77 (1987); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 77 F.C.C.2d 187, ¶ 25 (1980); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 247-48 (1987).

20 *See Alabama Cable v. Alabama Power*, 16 FCC Rcd 12209, ¶ 69 ("[A]ttachers frequently do not have a realistic option of installing their own poles or conduits both because, in many cases, attachers are foreclosed by local zoning or other right of way restrictions from constructing a second set of poles of their own and because it would be prohibitively expensive for each attacher to install duplicative poles.").

Consequently, the unreasonableness of these terms remains more theoretical than practical. In such circumstances, neither the pole owner nor the attacher needs to waste the money and resources litigating the reasonableness or unreasonableness of the term.

Establishing time limits or other limits on raising concerns about a pole attachment provision, however, would be likely to increase the number of pole attachment complaints. Attachers do not know, in advance, whether unreasonable provisions in an agreement will be enforced or triggered. In light of this risk, even though an unreasonable term remains unenforced, an attacher would be forced to file a complaint against the utility to modify the agreement. The time limits alluded to in the NPRM would have the perverse effect of increasing the number of pole attachment complaints filed with the Commission. Litigating hypothetical disputes on a regular basis would be a waste of resources for attachers, utilities, and the Commission. Therefore, policy considerations strongly counsel against the imposition of limits on the ability of attachers to sue under a pole attachment agreement.

More importantly, legal considerations prohibit the Commission from modifying its rules to limit pole attachment complaints. The Commission lacks the authority to extinguish rights that attachers have been granted under Section 224 of the Communications Act. If a utility engages in a practice that is unreasonable under Section 224, the Commission has the authority and obligation to enforce the terms of Section 224 against the utility. This is true regardless of whether a pole attachment agreement – the terms of which the Commission has acknowledged are often imposed on attachers – would countenance the unreasonable or anticompetitive practice. On many occasions, the Commission has acknowledged its jurisdiction to decide the reasonableness of pole attachment rates, terms, and conditions, regardless of the existence of an agreement between the parties.[21] That jurisdiction is not an optional task given to the Commission by the Commission itself nor is the authority derived from the terms of a pole attachment agreement;[22] rather, it is an obligatory role that is designated by the federal statute. The Commission cannot and should not withhold the exercise of Section 224's protections by imposing "contours" or limits on the ability of an attacher to execute a pole attachment agreement with a utility and later file a complaint challenging the lawfulness of a provision of that agreement. There is no statutory basis for imposing temporal or other limitations on the protections afforded by Section 224.

C. Pole Attachment Inventories

Utilities conduct pole inventories for the purpose of ensuring that poles are in the proper condition, that all attachments have been properly licensed, and that the poles and attachments are in compliance with safety requirements. Although utilities are permitted to impose reasonable charges on attachers for these inventories, utilities are increasingly using pole attachment inventories (which some utilities refer to as "pole attachment surveys" or "pole attachment audits"), as uncontrolled revenue-generating operations.

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21 *See, e.g.*, *Knology v. Georgia Power*, 18 FCC Rcd 24615, ¶ 14; *Mile Hi Cable Partners v. Public Serv. Co. of Colo.*, Order, 17 FCC Rcd 6268, ¶ 7 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.2d 675 (D.C. Cir. 2003); *Alabama Cable v. Alabama Power*, 16 FCC Rcd 12209, ¶ 18.

22 The Commission recognized that "a utility's obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement with the party seeking access." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 1160 (1996) (subsequent history omitted).

1. Billing Method

Utilities are supposed to recover the cost of pole attachment inventories through the maintenance account of the applicable pole attachment rate formula. The Enforcement Bureau has stated that

> costs attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission's formula. Consequently, we find the New Contract's provision requiring the Cable Operators to pay for routine pole inspections to be unreasonable.[23]

Most utilities follow these instructions. Some large utilities, though, are billing separately for the costs of pole attachment inventories rather than including those costs in the maintenance account of the pole attachment formula. They adamantly refuse to recover these costs through pole attachment rates. In response to Knology's objection, one utility complained that to recover pole attachment inventory costs through the pole attachment rate would result in an allocation of a portion of those costs to the utility itself (and, consequently, its ratepayers). The utility considered this to be unreasonable and refused to bill in accordance with the Enforcement Bureau's instructions.

Nor are these utilities paying for even a portion of the inventory costs, although they are themselves attachers. The failure to recover inventory charges through the pole attachment rate and the failure of some utilities to pay a portion of the inventory costs themselves unreasonably increases the inventory costs for other attachers and is inconsistent with the Commission's requirement that utilities count themselves as

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[23] *The Cable Television Association of Georgia v. Georgia Power Company*, Order, 18 FCC Rcd 16333, ¶ 16 (EB 2003) ("*Cable Television v. Georgia Power*"); *see also Cable Texas v. Entergy*, 14 FCC Rcd 6647, ¶ 13; *Newport News Cablevision v. Virginia Electric and Power Co.*, Order, 7 FCC Rcd 2610, ¶ 8 (CCB 1992).

attachers.[24] The Commission should adopt a rule clarifying that if utilities seek to recover the cost of pole inventories from attachers, they must do so by including the inventory costs in the maintenance account of the annual pole attachment fees and must share in paying for the costs of such inventories.

2. Amounts Charged for Inventories

The charges for pole inventories themselves should be reasonable. The Commission has concluded on numerous occasions that a pole owner is required to keep any costs imposed on an attacher to reasonable levels.[25] Pole inventory charges are not insignificant: they can result in bills of more than $150,000 to $200,000 for each market.[26] The methods of assessing pole inventory charges vary by utility: some utilities charge attachers on a per-pole basis while others charge on a per-attachment basis (typically, charges will be assessed in the manner that the contractors conducting the inventory are paid). As explained below, the per-attachment method is not reflective of the manner in which costs are incurred and often results in an over-count of pole attachments.

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24 *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, ¶¶ 47-51 (1998) ("*Telecom Rate Order*"), *aff'd sub nom. Southern Co. Services v. FCC*, 313 F.3d 574 (2002); *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 59 (2001) ("*Consolidated Reconsideration Order*"), *aff'd sub nom. Southern Co. Services v. FCC*, 313 F.3d 574 (2002).

25 *See Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536, ¶ 22 (EB 2007) ("*Salsgiver v. North Pittsburgh Tel.*") (citing *Cable Texas v. Entergy*, 14 FCC Rcd 6647, ¶ 14).

26 Other fees are sometimes added to the inventory charges, such as charges for administrative costs.

When contractors are paid for inventories on a per-attachment basis (*i.e.*, $1.75 charge per attachment found),[27] they have a financial incentive to find a greater number of attachments, since a higher attachment count will increase the amount they are owed for the inventory. Predictably, pole inventories in which contractors are paid on a per-attachment basis often generate an over-count of attachments, resulting in lengthy and expensive disputes with utilities. In one utility's territory, Knology recently had to perform its own inventory of every pole, taking photographs of each pole and drawing diagrams on each photograph to demonstrate where the contractor erred and over-counted Knology's attachments.[28] This second, independent inventory process (which revealed systematic over-counting of attachments) was extremely expensive and time-consuming. To protect against systematic over-counting (and the resulting expense of disputing those results), contractors should not be permitted to hold a financial stake in the outcome of inventories they conduct.

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27 One utility charges an exorbitant sum of $3.58 *per attachment* for a pole inventory. In another proceeding, a major utility claimed that a pole can be inspected in as little as ten minutes. *See Knology v. Georgia Power*, 18 FCC Rcd 24615, ¶ 30. In this instance, if there had been five attachers per pole (*i.e.*, the utility, the incumbent LEC, a cable operator, a competitive broadband provider and a competitive telecommunications carrier) and six poles could have been inspected in an hour, the contractor would have earned $107.40 per hour for a routine pole inspection, an unreasonably high hourly rate for this service.

28 In one pole attachment complaint proceeding, the Cable Services Bureau required utilities to provide attachers with access to all pertinent records so that the attacher could verify the results of inventories. *Mile Hi Cable Partners v. Public Serv. Co. of Colo.*, Order, 15 FCC Rcd 11450, ¶ 16 (CSB 2000), *aff'd* 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. v. FCC*, 328 F.3d 675 (2003) ("*Mile Hi Bureau Order*"). Some utilities produce inventory records but others refuse to do so. In the particular instance in which Knology conducted its own inventory, the utility produced the contractor's records of the inventory, but they were so vague that they did not lend themselves to independent verification.

The Commission should adopt a rule requiring that pole inventory charges be cost-based. The Commission should explain that because the cost of inspecting a pole is largely the same whether it has three or six attachments, the charge for inspecting that pole should not differ depending on the number of attachments. In addition, the Commission should adopt a rule making it *per se* unreasonable for: (1) utilities to pay contractors conducting pole inventories on a per attachment basis; (2) for any or all of a contractor's fee to be contingent upon finding unauthorized attachments; and (3) for a contractor's compensation to be tied in any way to the number of unauthorized attachments found during the inventory.

3. Discriminatory Counting Practices

The Pole Inventory Project Manual for one major utility indicates that "telephone (ILEC) attachments will be counted as 1 attachment for billing purposes only regardless of the number of actual attachments and the distance between them." However, in the subsequent paragraph applicable to attachers other than incumbent LECs, the Project Manual describes a different method of counting other attachments for billing purposes that would result in higher assessments for non-incumbent attachers. For example, an incumbent local exchange carrier could have four attachments spanning more than 12 inches and be charged for only a single attachment, whereas a *competitive* local exchange carrier would be charged for four attachments for the same facilities. There is no engineering basis nor is there a basis in the statute or the FCC's rules for this discriminatory treatment of non-incumbent attachments. The Commission should clarify that all non-electric attachments must be counted in the same manner.

D. Authorization for Service Drops

Knology is concerned with recent efforts by pole owners to drive up their pole attachment revenue by charging additional rent for ancillary equipment such as j-hooks[29] and service drops[30] attached to the pole. This is despite the fact that the use of j-hooks and service drops are essential to facilitate the provision of service to communities, and the equipment does not occupy any additional space on the pole. In fact, using equipment, such as j-hooks, to raise a drop line is necessary to ensure that the wires and cables serving the homes in the vicinity of the pole maintain sufficient clearance from the ground to meet National Electrical Safety Code and other safety standards. Provided that this incidental equipment is located within the one foot of space allocated to the attacher in the pole rental fee, it should not be treated as an additional attachment.[31] As the Commission has previously recognized, "in adopting a standard of one foot for space deemed occupied by [an attacher], the Commission not only included that space occupied by the cable itself, but also the space associated with any equipment normally required by

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29 J-hooks are small hooks that are used to raise the height of a service drop on a pole.

30 A service drop is generally used to connect a subscriber to the cable distribution network via a "tap" located on or near a distribution pole. *See Mile Hi Bureau Order*, 15 FCC Rcd 11450, ¶ 17.

31 The FCC reached a similar conclusion with respect to overlashing. It characterized overlashing as "important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities." *Telecom Rate Order*, 13 FCC Rcd 6777, ¶ 62. It also concluded that overlashing does not occupy additional space on the pole. *See Consolidated Reconsideration Order*, 16 FCC Rcd 12103, ¶ 58. In light of these factors, the FCC concluded that utilities should not be permitted to assess separate attachment fees for overlashed facilities. *See id.* ¶¶ 58, 61. The same rationale would apply to drop lines and j-hooks.

the presence of the . . . attachment."[32] Accordingly, the Commission should adopt rules prohibiting utilities from charging additional pole rent for these ancillary attachments.

Knology also applauds the Commission desire to address issues related to drop poles. It has been a long standing industry practice for pole owners to permit attachers to connect their facilities to drop poles without having to obtain a permit or gain approval prior to the attachment. This process has been essential in addressing and fulfilling the customer's service needs in a timely manner. Indeed, the Commission has previously recognized this fact and determined that with respect to drop poles, "notification to [the pole owner] of [the attacher's] use of a drop pole is reasonable but [the attacher] need not wait for approval prior to attaching."[33] Embracing this position, the Commission should adopt rules formally establishing the right to attach to drop poles without prior approval, provided that the pole owner is given notification of the attachment within a reasonable period of time thereafter.

E. Unauthorized Attachment Policies

Knology also believes that the Commission should address abuses by pole owners with respect to the assessment of unauthorized attachment penalties. Although utilities complain of unauthorized attachments, the unauthorized status is often the result of the utility's retroactive enforcement of a change in its attachment policies. In a number of instances, utilities have discarded years of industry practice and company-specific pole attachment policies in order to unilaterally reinterpret what constitutes an attachment to their poles. The Commission has previously found that such retroactive application of

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32 *Texas Cablevision Co. v. Southwestern Electric Power Co.*, PA-84-0007, 1985 FCC LEXIS 3818, ¶ 6 (rel. Feb. 26, 1985).

33 *Mile Hi Bureau Order*, 15 FCC Rcd 11450, ¶ 19.

new pole attachment policies to be unjust and unreasonable.[34] The Commission should formally adopt this position in its rules in order to prevent pole owners from abusing unauthorized attachment penalties in order to gain a financial windfall.

In addition, the Commission should implement rules specifying the manner in which unauthorized attachment penalties should be calculated. Knology has encountered instances where a utility, upon discovering what the utility claims is an unauthorized attachment, has demanded not only the back rent owed, but also exorbitant penalties as well as interest rates substantially higher than those set by the IRS.

The Commission has addressed unauthorized attachment penalties in several enforcement decisions and determined that a reasonable unauthorized attachment penalty is back rent from the time of attachment[35] or, where the time of attachment cannot be determined, an amount equal to the annual pole attachment fee from "the number of years since the most recent inventory or five years, whichever is less."[36] Despite the Commission's previous rulings, utilities routinely attempt to impose unauthorized attachment penalties that greatly exceed what the Commission has found to be reasonable. Consequently, the Commission should issue a rule clarifying that penalties for unauthorized attachment should not exceed the back rent owed to the utility, plus interest.

In addition, the Commission should clarify that the interest rate that is applied to the back rent should be the IRS rate for underpayments set forth in Section 6641 of the

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34 *See id.* ¶ 15 (rejecting the pole owner's attempt to retroactively apply the utility's new authorization policy regarding drop poles).

35 *See Cable Television v. Georgia Power*, 18 FCC Rcd 16333, ¶ 22.

36 *Mile Hi Bureau Order*, 15 FCC Rcd 11450, ¶ 14.

Internal Revenue Code ("IRS Rate"). On numerous occasions, the FCC has stated that the IRS rate should be used for interest on back rent payments in pole attachment cases.[37] Accordingly, the Commission should adopt rules to clarify that any attempt to assess an interest rate higher than the IRS rate is unreasonable *per se*, even when the unlawful interest rate is contained in a pole attachment agreement.

F. Make-Ready Practices

The make-ready process is too often slow and laden with excessive charges and fees. Yet, make-ready comes at a time when speed is critical: the attacher must construct its network to reach its market before it can generate revenue there. When utilities engage in unreasonable make-ready practices and the resulting lop-sided negotiations fail, attachers are left without any time-effective recourse. They must effectively choose between accepting the unreasonable practice (or paying the excessive charges) or putting the network construction on hold for years while they wait for the FCC to resolve the dispute. Both options are suboptimal. As an initial matter, the Commission should establish a mechanism to provide attachers in this position with expedited relief that is not expensive to trigger. The simplest course would be to modify the pole attachment rules governing Petitions for Temporary Stay[38] so that they may be used in the context of make-ready situations.

The Commission also should address the speed with which make-ready work is conducted. Perhaps the greatest enemy of an attacher in the make-ready phase is delay.

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37 *See id.*; *see also Time Warner Entertainment/Advance-Newhouse Partnership v. Florida Power and Light*, 14 FCC Rcd 9149, ¶ 11 n.36 (1999); *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, 79 F.C.C. 2d 232, ¶ 24 (1980), *order on recon.* 85 F.C.C. 2d 243 (1981).

38 47 C.F.R. § 1.1403(d).

Utilities are notoriously slow during the make-ready process and lack any incentive to process requests efficiently and quickly. This necessarily results in consumers experiencing significant delays in receiving service upgrades or competitive broadband options. It also extends the time period during which broadband providers are making substantial network investments without receiving any offsetting revenue from the market. To combat unreasonable delay, Knology has gone to the extreme measure of paying for two full-time utility employees to be dedicated solely to Knology's make-ready project.[39] Under this arrangement, the utility billed Knology not only for the hourly wages of these contractors, but also for their health insurance, bonuses, raises, workers' compensation, payroll taxes, cell phone charges, training classes, occasional meals, radios, computer and telecommunications costs at a total cost in excess of \$530,000.[40] These costs were merely a small fraction of the total make-ready costs that the utility charged to Knology for this single market.[41] Broadband providers should not have to undertake such extreme and expensive measures simply to obtain timely make-ready services from utilities.

Neither the utility's own incentives nor privately-offered incentives will motivate some utilities to conduct make-ready work in a timely fashion. Accordingly, the Commission should promote the timely construction and/or upgrade of broadband

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39 *See Knology v. Georgia Power*, 18 FCC Rcd 24615, ¶ 47.

40 *Id.* ¶¶ 47-49.

41 Even though Knology took extraordinary steps to facilitate timely performance of make-ready, the project still dragged on for several years before completion.

networks by requiring utilities to complete make-ready work within a specified time frame. Knology supports the proposal in Fibertech's petition.[42]

Knology would also support the proposal by Sunesys to impose a "six month rule" on utility make-ready operations.[43] However, Knology has reservations about the proposal by Sunesys to allow a utility to delay make-ready work in the event of a delay in payment by the attacher. Such an exception to the time limits would increase incentives for utilities to demand unreasonably high payments for make-ready services. To the contrary, Knology proposes that utilities be required to adhere to the time limits imposed in the Commission's rules even if an attacher refuses to pay unreasonable charges. While it continues to perform make-ready work, a utility should be permitted to file a complaint with the Commission against the attacher seeking both a determination that the charges assessed are reasonable and an order requiring the attacher to pay those charges.

The Commission's rules already prohibit delay in granting a request for access.[44] Once approval is granted, access to the poles still cannot be accomplished until make-ready work has been completed. Therefore, the same principle underlying Section 1.1403(b) of the Commission's rules would counsel in favor of adopting a time limit on completing make-ready.

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42 Fibertech Networks, LLC, Petition for Rulemaking, RM-11303, at 17-18 (Dec. 7, 2005).

43 *See* "Description of the Proposals of Sunesys, LLC," attached to Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Alan G. Fishel and Jeffrey E. Rummel, Arent Fox, Attorneys for Sunesys, LLC, RM-11303 (Aug. 28, 2007).

44 47 C.F.R. § 1.1403(b).

G. Excessive and Frivolous Litigation

In the *Telecom Rate Order,* the FCC declined to adopt specific pole attachment guidelines but instead determined that pole attachment disputes would best be resolved on a case-by-case basis.[45] However, many utilities are abusing the Commission's system of case-by-case adjudication by repeating the same unreasonable practices with impunity, disingenuously claiming that the Enforcement Bureau's decisions are not generally applicable.[46] As a result, telecommunications carriers, cable operators, and broadband providers are required to waste substantial sums of money and time resolving disputes with utilities over issues that have been decided multiple times by the Commission.[47] Currently, there exists no disincentive in the FCC's enforcement process against these unreasonable practices that force repeated litigation over the same issues that already have been decided in other complaint proceedings. For this reason, it is essential that the Commission adopt rules that will curtail this excessive litigation and impose penalties on utilities that willingly and repeatedly use the case-by-case adjudication method of

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45 *Telecom Rate Order*, 13 FCC Rcd 6777, ¶ 121.

46 For example, in 2000, the Florida cable operators brought a complaint against Gulf Power for unlawfully cancelling pole contracts and insisting they sign new contracts with a 600% rate increase. While the matter was pending before the Commission, Gulf Power's sister company, Alabama Power, participated in similar tactics and rate increases, resulting in another complaint before the Commission. While the Alabama Power proceeding has been resolved and exhausted of all its appeals, the Gulf Power proceeding is still under reconsideration before the Commission. *See Florida Cable Telecommunications Assoc. v. Gulf Power Co.*, EB Docket 04-381, Initial Decision, 22 FCC Rcd 1997 (2007); *Florida Cable Telecommunications Assoc. v. Gulf Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 9599 (2003); *Alabama Cable Telecommunications Assoc. v. Alabama Power Co.*, Order, 15 FCC Rcd 17346 (EB 2000), *aff'd* 16 FCC Rcd 12209 (2001), *aff'd, Alabama Power Co. v. F.C.C.*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003).

47 *Compare Mile Hi Bureau Order*, 15 FCC Rcd 11450, ¶¶ 11-14 (rejecting a $250 unauthorized attachment penalty) with *Salsgiver v. North Pittsburgh Tel.*, 22 FCC Rcd 20536, ¶ 28 (rejecting a $250 unauthorized attachment penalty in addition to back rent).

regulating pole attachments as a legal tactic to delay or thwart the enforcement of the Commission's rules and orders.

IV. CONCLUSION

For the reasons stated herein, Knology respectfully requests that the Commission establish a pole attachment rate using the formula contained in Section 224(d)(1) of the Communications Act of 1934, as amended, that would apply to all pole attachments used for broadband Internet access services (including those used to provide broadband Internet access service as part of a bundled package of services). Knology also respectfully requests that the Commission establish specific rules to govern the non-rate terms and conditions of access to utility poles as recommended herein.

Respectfully submitted,

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Dated: March 7, 2008

Certificate of Service

I, Chad S. Wachter, hereby certify that on this 7th day of March, 2008, I caused a true and correct copy of the foregoing Comments of Knology, Inc. to be mailed by electronic mail to:

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